long to a surety. Now a surety can in equity force his principal to pay the debt. *Bishop* v. *Day*, 13 Vt. 81. Every reason for allowing such a suit appears to apply with equal force here. Clearly the legal remedy is inadequate. Consequently it is not easy to uphold the Pennsylvania case. It is true that there is a state statute on which the case may be supported, but on this the court did not rely.

As to the Canadian case it is necessary to look further. Is the mortgagor a surety of his purchaser as to the mortgagee? At once it appears that under ordinary principles of contracts there is no principal legal obligation from the purchaser to the mortgagee, and so the purchaser can never be in default to the mortgagee. Although the latter can reach the obligation of the purchaser in equity, he has no rights against him at law, except under the anomalous doctrine that the beneficiary of a promise may sue. See 14 HARV. L. REV. 462; 12 HARV. L. REV. 139. Consequently, as to him it seems there is no real suretyship. It is true that if one of two joint debtors, by an arrangement with the other, becomes simply a surety for him, the creditor with notice of this is bound just as if the two were originally principal and surety, and any giving of time to the principal discharges the surety. *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586. But in that case there is an actual primary liability on the other debtor still existing. In the case under consideration it may be said that after notice the creditor should look first to the land and its owner for his debt. But the creditor has never agreed to accept the land as his primary debtor. It seems then that though a very similar relation exists, there is not a true suretyship. Nevertheless most of the cases have been decided as if there were a true case of suretyship, either to the extent of the whole debt, if the buyer promised to pay, or to the extent of the value of the land, in the absence of an express promise, and so the mortgagor has been held discharged to this amount by the slightest giving of time to the purchaser. *Commercial Bank* v. *Wood*, 56 Mo. App. 214; *Travers* v. *Dorr*, 60 Minn. 173; *Murray* v. *Marshall*, 94 N. Y. 611. See, *contra*, *Corbett* v. *Waterman*, 11 Ia. 86. Certainly the same injury to the mortgagor results from the giving of time as would result to a surety, for the creditor has similarly barred his own rights, and so, in the principal case, cannot transfer the right to foreclose to the mortgagor if he makes payment. It is true that at first sight there is no very evident equity in discharging one who suffers no damage. It is submitted, however, that the rule as to discharge by giving time is merely part of the broader rule that any variation of the surety's risk which may injure him to an amount that cannot at the time be ascertained discharges him. This rule has been found necessary to protect the surety, and seems no less necessary to the protection of the mortgagor; nor does the partial difference between the positions of the two suggest any reason for a distinction in this respect. But see *Denison University* v. *Manning*, 61 N. E. Rep. 706 (Ohio). The Canadian decision, therefore, in refusing to follow the rule of suretyship, seems unfortunate.

THE EXTENT OF THE POWER OF EMINENT DOMAIN. — A suggestion as to the purposes for which the power of eminent domain may be constitutionally exercised is furnished by a recent case in the Indian Territory. *Tuttle* v. *Moore*, 64 S. W. Rep. 585 (I. T., C. A.). An Act of Congress,

appropriating Indian lands to be sold to individuals as town lots in accordance with a general town-site scheme, was sustained on two grounds: first, that it constituted an exercise of the control delegated to Congress over Indian tribes; second, that it was a taking for a public use, and so a legitimate exercise of the power of eminent domain within the Constitution, it being assumed that such action in the territories was governed by the provisions of that instrument. One judge, while concurring in the result, thought that the taking was not for a public use, and so dissented from the second ground.

The power of eminent domain is inherent in sovereignty. *United States* v. *Jones*, 109 U. S. 513. There is always a moral duty to give compensation, and to exercise the power only for public purposes. It is only when this moral duty is made a legal one by constitutions that the judiciary may have a voice in the matter. See note in 1 Thayer, Cas. Const. Law, 952. This limitation, as regards the Federal Government, is found in the Fifth Amendment, and, as regards the States, in similar provisions in the state constitutions. What constitutes a public use, as therein provided, has been the subject of many conflicting opinions. Many authorities would confine it to some actual use or enjoyment by the public of the *res* taken. *Board of Health* v. *Van Hoesen*, 87 Mich. 533; 1 LEWIS, EM. DOM., § 163. The sounder and more liberal view extends it to whatever is of benefit to any considerable portion of the public, as regards health, material prosperity, or other welfare. *Talbot* v. *Hudson*, 16 Gray (Mass.) 417; Walworth, C., in *Beekman* v. *Saratoga, etc., R. R.*, 3 Paige (N. Y.) 45, 75. Accordingly, the power has been exercised for such purposes as the flowage of land by mill dams, the laying out of a national park, the benefit of mining interests, etc. *Olmstead* v. *Camp*, 33 Conn. 532; *United States* v. *Gettysburg, etc., Ry. Co.*, 160 U. S. 668; *Overman, etc., Co.* v. *Corcoran*, 15 Nev. 147. It is often said that, although the necessity or expediency of the exercise of the power lies wholly in the discretion of the legislature, the question whether the use is in fact a public one is for the courts. *Matter of Deansville Cemetery Association*, 66 N. Y. 569; 1 Lewis, Em. Dom., § 158. According to the more accurate view, however, the whole question is for the legislature, controlled by the courts only where there is a palpable abuse. 2 KENT, COM., 12 (Holmes') ed., 340 (*a*)[1]; *Hazen* v. *Essex Co.*, 12 Cush. (Mass.) 475; see also *Olmstead* v. *Camp*, *supra*. Therefore it would seem that, since the question is a legislative one and the legislature has declared the purpose to be public by the very exercise of the power, it is only when it is unreasonable to consider the purpose public that the judiciary can declare the action of the legislature unconstitutional. In other words, the legislature exceeds its power only when its action is merely arbitrary, and it is only where it exceeds its power that the courts can intervene. See 7 HARV. L. REV. 129, 148.

The court however may well be more strict in construing a statute delegating the power of eminent domain to a corporation, since then the question relates not to the power of the legislature, but to the authority that has in fact been conferred by the legislature. See note in 1 Thayer, Cas. Const. Law, 673.

It is apparent that a taking of unimproved land for town-site purposes might well be of inestimable benefit to any sparsely settled or slightly developed region; and, though the needs and circumstances of the community must always be taken into consideration, it is difficult to say that,

even in a more fully developed locality, such a taking would be so clearly unwarranted and arbitrary as to be declared unconstitutional. The suggestion of the court in the principal case would seem, therefore, to be based on sound reason and a liberal conception of the legislative power.

THE ASSIGNMENT OF A CLAIM ALREADY PARTIALLY COLLECTED BY THE ASSIGNOR'S AGENT. — Some interesting questions are raised by a recent decision in the New York Court of Appeals. *Curtis* v. *Albee*, 167 N. Y. 360. The plaintiff assigned to the defendant a claim against an insolvent as "a claim for an unpaid balance of $2000." Unknown to both parties, at the time of the assignment about $800 had been paid upon the claim by the insolvent's assignee to the attorney of the plaintiff. The defendant afterwards learning of this payment induced the attorney to turn over to him the money thus collected, and the plaintiff brought an action for a reformation of the contract of assignment and other equitable relief. In denying that the plaintiff was entitled to any relief against the defendant, the court took the position that the attorney was still indebted to the plaintiff, and the defendant apparently indebted to the attorney, but that the defendant owed nothing to the plaintiff directly.

The *dictum* that the transfer of a claim does not carry with it payments made without the knowledge of the assignor before the transfer is clearly sound. A contrary result, however, was effected by the construction of an instrument of assignment in an essentially similar case. *Klock* v. *Buell*, 56 Barb. (N. Y.) 398. Assuming that the assignment passed to the defendant no interest in the money wrongfully paid over to him by the attorney of the plaintiff, the decision that the plaintiff cannot recover it from him directly seems to be undesirably technical. The money, when paid to the attorney, was held by him in trust for the plaintiff. *Frost* v. *M'Carger*, 14 How. Pr. (N. Y.) 131. If he kept the money apart from his own funds until he paid it to the defendant, it is the simple case of trust funds paid to a volunteer with notice. If he wrongfully mingled the amount with his own funds, he stood in the position of a debtor to the plaintiff. *Nevius* v. *Disborough*, 13 N. J. L. 343. But upon his designating certain money as that belonging in equity to his principal there seems to be no good reason why the latter should not be permitted to claim it as trust funds, and follow it into the hands of a volunteer. Such in effect was the decision in *Matter of Le Blanc*, 75 N. Y. 598.

Although the decision in the principal case in denying the assignor a direct recovery from the assignee cannot be supported upon the reasoning advanced, the result seems equitable upon grounds apparently not presented in argument. The assignor of a claim impliedly warrants that it is an existing and valid claim for the amount specified. *Gilchrist* v. *Hilliard*, 53 Vt. 592. The measure of damages for the breach of this warranty is the difference in value of the claim as actually transferred and as represented. *Bennett* v. *Buchan*, 61 N. Y. 222. In the principal case the value of the plaintiff's claim against his debtor became fixed upon the latter's insolvency. The difference between what the defendant received upon the claim as actually transferred, and what he would have received upon the claim as described, is measured by the sum paid to the plaintiff's attorney before the assignment. A recovery of that amount by the plaintiff in this action would be followed by a recovery